80-783

No. _____

Supreme Court, U. S.
FILED
NOV 15 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term 1980

PARK COUNTY, MONTANA and SWEET GRASS COUNTY, MONTANA, political subdivisions of the STATE OF MONTANA,

Petitioners,

-vs-

UNITED STATES OF AMERICA, acting by and through the SECRETARY OF AGRICULTURE and the FOREST SUPERVISOR of the Gallatin National Forest, and CROSS CREEK PROTECTIVE ASSOCIATION,

Respondents.

On Writ of Certiorari

to the Court of Appeals for the Ninth Circuit

Petition for Certiorari

Counsel of Record for Petitioners:

CONRAD B. FREDRICKS
Sweet Grass County Attorney
115 W. 2nd Ave. - P.O. Box 1047
Big Timber, Montana 59011
Phone: (406) 932-2311

Other Counsel:

BRUCE BECKER
Park County Attorney
Park County Courthouse
Livingston, Montana 59047

KENNETH OLSON
Special Deputy Sweet Grass County Attorney
Suite 316, 600 Central Plaza
Great Falls, Montana 59401

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

PARK COUNTY, MONTANA and SWEET GRASS COUNTY, MONTANA, political subdivisions of the STATE OF MONTANA,

Petitioners,

-vs-

UNITED STATES OF AMERICA, acting by and through the SECRETARY OF AGRICULTURE and the FOREST SUPERVISOR of the Gallatin National Forest, and CROSS CREEK PROTECTIVE ASSOCIATION, [1]

Respondents.

★★★★★★★★★★★★

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

★★★★★★★★★★★★

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

PARK COUNTY, MONTANA and SWEET GRASS COUNTY, MONTANA, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on August 29, 1980.

QUESTIONS PRESENTED

(1) Whether the 12-year statute of limitations under 28 U.S.C. §2409a(f) applies to every action brought under that Act, notwithstanding that the plaintiff is a state, a political subdivision of a state or some other governmental entity, attempting to enforce a sovereign or public right, as opposed to a proprietary right.

[1] The Mountain States Legal Foundation appeared as amicus curiae in the Circuit Court.

(2) Whether the District Court properly concluded that as a matter of law the plaintiffs-petitioners knew or should have known of the claim of the United States to the right-of-way claimed by plaintiffs, and all thereof, more than 12 years before this action was brought.

TABLE OF CONTENTS

	Page
Questions Presented	1
Opinions Below	3
Jurisdiction	3
Statute Involved	3
Statement	5
Reasons For Granting This Writ	7
Conclusion	11
Appendix:	
Opinion of United States Court of Appeals for the Ninth Circuit	13
Opinion of United States District Court for the District of Montana-Billings Division	18
Judgment — United States District Court for the District of Montana-Billings Division	23
Judgment — United States Court of Appeals for the Ninth Circuit	24

TABLE OF AUTHORITIES

Cases:	
Bartz v. Paff, 95 Wis. 95, 69 N.W. 297	10
Hersey v. Neilson, 47 Mont. 132, 131 Pac. 30 (1913)	10
Metropolitan Railroad Company v. District of Columbia, 132 U.S. 1,11,12 (1890)	8,9
U.S. v. Detroit Timber & Lumber Co., 200 U.S. 321	10
Williams v. Jefferson Standard Life Ins. Co., 187 S.C. 103, 196 S.E. 519 (1938)	10
Constitution and Statutes:	
United States Constitution:	
Amendment 10	8

28 U.S.C.:
1254 3
2409 5
2409a 3
2409a(f) 6,7,8,10,11
43 U.S.C.:
932 5,6,8,10,11
Miscellaneous:
Montana Political Code of 1895, Section 2600 5

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana, the Hon. James F. Battin, District Judge, is unreported and is printed in the Appendix hereto, infra, page 18. The opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is printed in the Appendix hereto, infra, page 13.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit (Appendix, infra, page 24) was entered on the 29th day of August, 1980. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTE INVOLVED

The statute involved is 28 U.S.C. §2409a, which provides as follows:

> "(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title [USCS §§1346, 1347, 1491, or 2410], sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), [26 USCS §§7424, 7425, and 7426], or section 208 of the Act of July 10, 1952 (43 U.S.C. 666) [43 USCS

§666].

"(b) The United States shall not be disturbed in possession of control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

"(c) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

"(d) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title [28 USCS §1346(f)].

"(e) A civil action against the United States under this section shall be tried by the court without a jury.

"(f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

"(g) Nothing in this section shall be construed to permit suits against the United States based upon

adverse possession. (Added Oct. 25, 1972, P.L. 92-562, §3(a), 86 Stat. 1176.)"

STATEMENT

The plaintiff-petitioners (hereinafter called "Petitioners") are counties, which are political subdivisions of the State of Montana. On October 4, 1976, Petitioners filed a complaint, under the provisions of 28 U.S.C. §2409, to quiet title to an easement across certain lands located within the boundaries of the Gallatin National Forest.

This action was filed to quiet title to an alleged county road right-of-way across a part of the Gallatin National Forest located in Park and Sweet Grass Counties, Montana. It was alleged that a county road was established in 1893 from Chimney Rocks Pass, which is located near Cooke City, Montana, along the route generally described in paragraph IX of the complaint, to the vicinity of the Hidden Treasure Mines, as shown on the map, Exhibit "C" to the complaint. In 1893, Park County also contained the lands now comprising Sweet Grass County. On March 5, 1895, Sweet Grass County was created out of a part of Park County and the alleged road is now located partly in Park County and partly in Sweet Grass County. (Complaint, paragraph IV.) Petitioners alleged that: "All legal requirements for the establishment of the road from Chimney Rocks Pass to the Boulder Mining District were met and a county road was duly established; and in the event any technical defect or defects existed with regard to establishing the road in a manner strictly in compliance with the existing laws said defect or defects were cured by the enactment of Section 2600 of the Montana Political Code of 1895, which was a statute specifically enacted to cure any prior procedural irregularities in the establishment of public highways." (Complaint, paragraph XI); and also alleged in paragraphs XIII and XIV of the complaint that:

"That prior to the establishment of the Absaroka National Forest on September 4, 1902, the Board of County Commissioners of PARK COUNTY, MONTANA, accepted the grant of right-of-way conveyed in Section 932 of Title 43 of the United States Code, in that said Board of County Commissioners

intended to accept said grant, laid out, created, constructed or took positive action in furtherance of the acceptance of said grant."

"That because the Board of County Commissioners of PARK COUNTY, MONTANA, accepted the grant of a highway right-of-way conveyed in Section 932 of Title 43 of the United States Code, for the road from Chimney Rocks Pass to the Boulder Mining District, said road was not reserved for the public when the area through which said road passes was made a part of the Absaroka National Forest on September 4, 1902; therefore, the defendant, UNITED STATES OF AMERICA, has no right, title or interest in said property."

The foregoing, basically, was the claim of the Petitioner counties.

In their answer, the defendant, UNITED STATES OF AMERICA (hereinafter called "Government"), alleged, among other things, as an affirmative defense that the time prescribed by the statute of limitations for filing this action had been exceeded.

After the complaint was filed, CROSS CREEK PROTECTIVE ASSOCIATION (hereinafter called "Cross Creek") was allowed to intervene as a party defendant.

In their answer, Cross Creek raised the following affirmative defense:

"Plaintiffs are barred from prosecuting this action by 28 USC 2409(f) because the statute of limitations has lapsed and Plaintiffs knew and should have known of the claim of the United States to the real property in question over twelve years prior to the commencement by Plaintiffs of this action."

and also were allowed to amend their answer to allege, as an additional affirmative defense, the defense of laches.

After certain discovery, the Government moved the District Court to dismiss this action for lack of jurisdiction and Cross Creek moved for summary judgment, upon the ground of failure to bring this action within the 12-year limitation period prescribed by 28 U.S.C. §2409a(f).

Cross Creek's motion for summary judgment was solely upon "the grounds that, with respect to the question whether Plaintiffs are barred from bringing the present action by the statute

of limitations, there are no material facts in dispute and Defendants are entitled to Judgment in their favor as a matter of law."

On March 17, 1978, the Court granted both motions and ordered that judgment be entered in favor of the Government and Cross Creek and denying Petitioners all relief.

The District Court, in its "Memorandum and Order" granting the motions, stated that: "The basis for both motions is the assertion that plaintiffs are barred from bringing the present action by the provisions of 28 U.S.C. §2409a(f)."

Such a judgment was entered on March 21, 1978. Petitioners filed a notice of appeal from said judgment on April 18, 1978.

The appeal was decided adversely to Petitioners by the United States Court of Appeals on August 29, 1980.

The decision of the Court of Appeals regarding the question of whether the Petitioners "knew or should have known of the claim of the United States" to the road right-of-way in question, more than twelve years prior to the commencement of the action,within the meaning of 28 U.S.C. §2409a(f), hinges upon the placement of a sign by the Government, in 1962, at one point adjacent to the claimed county right-of-way. A small pile of rocks were also placed along the banks of Slough Creek where the claimed right-of-way crossed Slough Creek at this point.

There is some dispute as to whether the claimed right-of-way goes through what was then the Absaroka Primitive Area and whether the sign referred to the road or to the Primitive Area to the immediate west of the road.

However, even assuming that the road, which is about 26 miles long, did go through what was then the Absaroka Primitive Area, it only could have gone through it for, at most a mile or two, and the sign could only relate to this portion of the claimed right-of-way.

REASONS FOR GRANTING THIS WRIT

There are two questions of great importance for granting this writ.

The first is whether a statute of limitations or adverse

possession may run against a public highway maintained by a governmental body.

This Court has never decided this issue, with respect to a public highway, so far as is known to Petitioners.

The issue really is grounded in the concept of state sovereignty and whether the Federal government, by some non-judicial, non-legislative, and apparently inadvertent solely administrative action, may extinguish a State right specifically granted by Congress by hiding behind the cloak of sovereign immunity and a statute of limitations.

The right in question was granted by what is now 43 U.S.C. §932, which was in effect in 1893, and which provided as follows:

> "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

It is submitted that the application of the statute of limitations in this case would be in derogation of the grant conferred by what is now 43 U.S.C. §932. It is submitted that the enactment of 43 U.S.C. §932, which has been on the books, apparently, since 1866, is a recognition by Congress of the extreme importance of public highways and would indicate that Congress would not intend the limitations period of 28 U.S.C. §2409a(f) to apply where a right granted by 43 U.S.C. §932 is sought to be enforced.

And the issue also relates to the philosophy of Amendment 10 to the Constitution of the United States and the reservation of the powers to the States contained therein.

As Mr. Justice White is quoted as saying, while on a visit to Montana, in the September 14, 1980 issue of "The Billings Gazette", a newspaper published in Billings, Montana:

> "There are many areas, things the federal government can't and shouldn't touch. I think the court should be very careful about state rights...I think the court should be very careful to retain state power and not unduly frustrate it."

This Court discussed the concept which is at issue here in **Metropolitan Railroad Company v. District of Columbia,** 132

U.S. 1 (1890).

This suit involved a suit by the District of Columbia to recover from the Metropolitan Railroad Company certain moneys expended as a result of the alleged neglect of the defendant to do certain work and furnish materials in accordance with its duty as prescribed by its charter.

The Court determined that District of Columbia, by specific legislation, was at that time a municipal corporation and was subject to the ordinary rules that governed the law of procedure between private persons, including statutes of limitations, and that the applicable statute of limitations embraced municipal corporations.

This Court, in discussing the statute of limitations, stated (132 U.S. at 11):

> "It cannot apply to the sovereign power, of course. No restrictive laws apply to the sovereign, unless so expressed. And especially no laws affecting a right on the ground of neglect or laches, because neglect and laches cannot be imputed to him. And it matters not whether the sovereign be an individual monarch, or a republic or state. The principle applies to all sovereigns. The reason usually assigned for this prerogative is, that the sovereign is not answerable for the delinquencies of his agents. But whatever the true reason may be, such is the general law – such the universal law, except where it is expressly waived."

The Court, although finding the municipal corporation to be subject to the statute of limitations with regard to the subject matter being sued upon, limited the application of the holding by going on to state (132 U.S. at 12):

> "What may be the rule in regard to purprestures and public nuisances, by encroachments upon the highways and other public places, it is not necessary to determine. They are generally offences against the sovereign power itself, and, as such, no length of time can protect them."

In Montana, counties are **not** municipal corporations. They

are governmental agencies or political subdivisions of the state, organized for the purposes of exercising some functions of the state government. Such subdivisions are instrumentalities of government, and exercise the powers delegated by the state, and act for the state. **Hersey v. Neilson,** 47 Mont. 132, 131 Pac. 30 (1913).

The second question of importance here is how much action is needed on the part of the Federal government to set the statute of limitations of 28 U.S.C. §2409a(f) running to extinguish the right granted by Congress in, apparently, 1866 by what is now 43 U.S.C. §932.

As pointed out heretofore, the acts relied upon by both the District Court and the Court of Appeals were the obviously inadvertent and solely administrative actions by the Forest Service in erecting a sign and a rock pile in a remote area of the National Forest.

There was no evidence that any official of Sweet Grass County or Park County had actual notice of or saw the sign or rocks more than 12 years prior to the commencement of this action.

Before anyone can be charged with constructive notice of a fact, he must first have actual notice of **some** fact that would lead to a duty of inquiry as to the ultimate fact. No duty can exist without knowledge of the facts, or at least, knowledge sufficient to put one on inquiry which will lead to a discovery of the facts, upon which such duty rests. **Bartz v. Paff,** 95 Wis. 95, 69 N.W. 297.

A person who is wholly ignorant of facts from which a presumption of constructive notice arises does not have "constructive notice" of such facts. **Williams v. Jefferson Standard Life Ins. Co.,** 187 S.C. 103, 196 S.E. 519 (1938).

The U.S. Supreme Court, in **U.S. v. Detroit Timber & Lumber Co.,** 200 U.S. 321, stated a rule applicable to the question of "should have known" as follows:

> "When a person has not actual notice he ought not to be treated as if he had notice, unless the circumstances are such as to enable the court to say, not only that he might have acquired, but also that he ought

to have acquired, it but for his **gross negligence** in the conduct of the business in question." (Emphasis supplied.)

Surely, it cannot be said as a matter of law that the County Commissioners of either County can be charged with gross or culpable negligence in not ascertaining that the Forest Service had erected a sign and placed a few small rocks in 1962 in an extremely remote area.

In connection with this issue is the question of whether the right granted by Congress, by what is now 43 U.S.C. §932, can be extinguished over an entire road by erection of a sign which clearly relates only to a small portion of the road.

It is submitted that the questions at issue here are "important questions of federal law which have not been, but should be, settled by this court", within the meaning of Rule 17 of the Rules of the United States Supreme Court.

The precedent set here by the lower courts is extremely important, particularly in the states which have large amounts of Federal lands. If it is upheld, the setting of a speed limit sign or some other innocuous traffic sign, alongside a state highway which runs through Federal land, could result in running of the 28 U.S.C. §2409a(f) statute of limitations and extinguish the state highway right after 12 years.

CONCLUSION

For the foregoing reason this petition for a writ of certiorari should be granted.

Respectfully submitted,

CONRAD B. FREDRICKS
Sweet Grass County Attorney
Conrad B Fredricks
Counsel of Record for Petitioners
Address: 115 West Second Avenue
P.O. Box 1047
Big Timber, Montana 59011

OTHER COUNSEL:

BRUCE E. BECKER
Park County Attorney
Park County Courthouse
P.O. Box 823
Livingston, Montana 59047

KENNETH R. OLSON
Special Deputy Sweet Grass County
Suite 316, 600 Central Plaza
Great Falls, Montana 59401

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PARK COUNTY ASSOC. et al.,
Appellant
v.
USA, CROSS CREEK PROTECTIVE ASSOCIATION
Appellee

No. 78-1930
OPINION

Appeal from the United States District Court
for the District of Montana

Before: KENNEDY and SCHROEDER, Circuit Judges, and TANNER*, District Judge.

PER CURIAM

Appellants/[1] appeal from the dismissal of the defendant, United States, and the motion for summary judgment of defendant-intervenor, Cross Creek Protective Association, under the provisions of the Quiet Title Act, 28 USC §2409a(a)/[2] and (f)/[3]. We affirm.

Appellants are counties, which are political subdivisions of the State of Montana. On October 4, 1976, Appellants filed a complaint, pursuant to 28 USC §2409, to quiet title to an easement across certain lands located within the boundaries of the Gallatin National Forest. Subsequently, Cross Creek Protective Association (hereinafter referred to as "Cross Creek"), a local citizen organization, was allowed to intervene as a party defendant.

*The Honorable Jack E. Tanner, United States District Judge for the Western District of Washington, sitting by designation.

The issues presented on appeal are: (1) whether the 12-year statute of limitations under 28 USC §2409a(f) applies to every action brought under that act, notwithstanding that the plaintiff is a state, a political subdivision of a state, or some other governmental entity, and (2) whether the district court properly concluded that as a matter of law there was adequate notice that the appellants knew or should have known of the claim of the United States to the purported right-of-way more than 12 years before this action was brought.

Appellants contend that the 12-year statute of limitations in 28 USC §2409a(f) is inapplicable to them because they are "political subdivisions of the state government." In support of this proposition they allege that because counties are governmental agencies or political subdivisions of the state government with powers delegated by the state, they are in effect "arms" of the state government and as such are imbued with the sovereignty of the state. Appellants also argue that because the dispute is over public roads and appellants are acting to protect the "public rights" they, therefore, are acting under the cloak of state sovereignty.

The district court concluded that it had no power to engraft exceptions for any reason to the language of 28 USC §2409a(f) and that the 12-year statute of limitations as established by Congress must be strictly construed. It noted the explicit language of 28 USC §2409a(f) which provides that: "**Any** civil action under this section shall be barred **unless** it is commenced within 12 years of the date upon which it accrued". (emphasis added). Since the defense of the statute of limitations is jurisdictional in suits against the United States, failure to satisfy the requirements of 28 USC §2409a(f) cannot be waived and may be raised at any time. **Grosz v. Andrus,** 556 F2d. 972 (9th Cir. 1977).

The district court observed that the plaintiffs-appellants failed to point to any statutory language or legislative history that would support the proposition that counties enjoy a status different from all other litigants under 28 USC §2409a(f). We agree. **See** H.R. Rep. No. 92-1559, 92d Cong., 2d Sess. (1972), reprinted in [1972] U.S. Code Cong. & Ad. News 4547. Furthermore, in affirming the district court we find the cases/[4]

cited by appellants to be inapplicable because they are based primarily on common law doctrines of sovereignty and state court decisions interpreting the extent of this sovereignty. Unlike those cases, this case involves a federal statute of limitations in a suit against the United States in a federal forum. Such statutes of limitation are generally applicable to governmental entities as well as individuals. **See United States v. Louisiana,** 127 U.S. 182, 185, 192 (1888); **California v. United States,** 137 F. Suppl. 208 (Ct. Cl. 1955).

We now turn to the issue whether the appellant should have had notice or knowledge of the United States' claim.

The Absaroka National Forest was established on September 14, 1902, and was later named the Gallatin National Forest. Appellants claim that they own the road right-of-way that is within the boundaries of the Gallatin National Forest. The road right-of-way in controversy is located in both Park County and Sweet Grass County, Montana. Sweet Grass County was part of Park County until March 5, 1895.

Appellants also contend that all legal requirements for establishing this road were satisfied and that their actions constituted acceptance of a grant of a road right-of-way on public lands pursuant to 43 U.S.C. §932/[5] . The major portion of the purported road right-of-way claimed by the counties travels a route following Forest Service Trails 104 and 184. The district court concluded that "[U]nquestionably the trails are United States Forest Service Trails. The forest service has maintained the trails since the early part of the 20th Century. Neither of the counties has maintained the purported road or authorized expenditures of any county money to maintain any of the routes in the Absaroka National Forest."

When the Absaroka Primitive Area was established in April of 1932, a portion of the claimed right-of-way made by the Appellants followed forest service trail 104 through Absaroka Primitive area. In 1962, the Forest Service placed a sign at the North End of the Absaroka Primitive Area at the intersection of Slough Creek and Forest Service Trail 104. The sign stated: "Entering Absaroka Primitive Area-Motor Vehicles Prohibited-

Gallatin National Forests".

We are not persuaded by appellants' contention that the placing of the sign, approximately 41 air miles from the county seat of Park county, and approximately 48 air miles from the County Seat of Sweet Grass County, constituted notice, if any, only as to the portion of the right-of-way behind the sign./[6]

The sign gave notice that motor vehicle traffic was being prohibited by the Forest Service. A rock barrier was also placed across the trail in front of the sign. The district court, therefore, properly concluded that in 1962 the Forest Service claimed ownership and jurisdiction of the land transversed by the purported right-of-way by posting notice of its interest. **Grosz v. Andrus, supra.** The county should have known of the United States claim to the lands in question on or before October 4, 1964. In this regard, the denomination of the claim of the United States as legal or equitable has no practical significance on the question of notice of the United States interest and the property to which title is sought to be quieted. **Hatcher v. United States,** 402 F. Supp. 1192, 1194-95 (E.D. Cal. 1975).

Thus, the district court's dismissal of appellants' complaint was entirely proper. The district court did not err in concluding that this action was barred by 28 USC §2409a(f) or that the appellants knew or should have known of the claim of the United States to the purported right-of-way more than 12 years before this action was brought. Disposition by summary judgment was proper in that there was no genuine issue as to any material fact and that the appellees were entitled to judgment as a matter of law pursuant to 28 USC §2409a(f).

FOOTNOTES:

/1. Montana Association of Counties of Mountain States Legal Foundation was allowed to file an amici curiae brief.

/2. 28 USC §2409a(a) reads:

"The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 USC. 7424, 7425, and 7426) or section 208 of the Act of July 10, 1952 (43 U.S.C. 666)."

/3. 28 USC §2409a(f) provides:

"Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States."

/4. **Ralston v. Town of Weston,** 46 W. Va. 544, 33 S.E. 326 (1899).

/5. 43 USC 932 reads as follows:

"The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted, R.S. §2477."

/6. The appellants also contend that, even if they had notice of the United States claim to that portion of the purported right-of-way located "behind" the Forest Service sign, this notice would not apply to the remainder of the right-of-way. However, in 1962 the appellants were put on notice that the United States claimed control over at least a substantial portion of the right-of-way. This claim should have put the appellants on constructive notice and alerted them to make the reasonable inquiry as to the remainder of the purported right-of-way since the remainder would have little or no remaining utility if it were served.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

PARK COUNTY, MONTANA, and SWEET GRASS COUNTY, MONTANA, political subdivisions of the State of Montana,

Plaintiffs,

-vs.-

UNITED STATES OF AMERICA, acting by and through the SECRETARY OF AGRICULTURE and the FOREST SUPERVISOR of the Gallatin National Forest, and all other persons, known or unknown, claiming or who might claim any right, title, estate or interest in, or lien or encumbrance upon the real property described in the Complaint, or any part thereof, adverse to the plaintiffs' ownership, or any cloud upon the plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued, or elective share of a surviving spouse,

Defendants.

CROSS CREEK PROTECTIVE ASSOCIATION,

Defendant-Intervenor.

} CV-76-125-BLG MEMORANDUM AND ORDER

The plaintiff counties have filed an action seeking to quiet title to certain lands located within the boundaries of the Gallatin National Forest. The land in question is a purported road right-of-way alleged to have been established by a survey conducted in 1893. The road supposedly established a route from Chimney Rock Pass, generally following what has now been designated as Forest Service Trail No. 184, to a point where it joins another road said to have been established. The joining trail runs from the vicinity of the Hidden Treasure Mine across the Boulder River Basin through the Slough Creek Divide and down Slough Creek to Lake Abundance Creek, generally following a route designated as Forest Service Trail No. 104. The United States has moved the Court to dismiss this action for lack of jurisdiction. The motion is supported by a brief. Likewise, defendant intervenor, Cross Creek Protective Association, has moved for summary judgment, with a supporting brief. The basis of both motions is the assertion that plaintiffs are barred from bringing the present action by the provisions of 28 U.S.C. § 2409a(f). The Court having considered the motions, finds that the case is a proper case for disposition by summary judgment in that there are no material facts in dispute and that defendants are entitled to judgment in their favor as a matter of law. Rule 56, Federal Rules of Civil Procedure.

The United States may be named as a party defendant in a civil action to adjudicate a disputed title to real property in which the United States claims an interest. 28 U.S.C. § 2409a(a). However, there are restrictions placed on the bringing of such an action. One such limitation is the period within which the case must be commenced. 28 U.S.C. § 2409a(f) provides:

> "Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States."

In considering the applicability of the period of limitations set forth in § 2409a(f), it is necessary to note that the statute of limitations is jurisdictional. **Gendron v. United States,** 402 F.

Supp. 46 (E.D. Cal. 1974), **aff'd** 524 F. 2d 1154 (9th Cir. 1975). **See also, Groz v. Andrus,** 556 F. 2d 972 (9th Cir. 1977); **Power v. United States,** 390 F. 2d 602 (9th Cir. 1968). In suits against the United States, the question of the statute of limitations is a defense which cannot be waived because of the sovereign power of the United States. **H-10 Water Taxi Company, Ltd. v. United States,** 379 F. 2d 963 (9th Cir. 1967). Finally, although there may be cases where exceptions to the applicability of the statutes of limitations might be desireable, the Courts are not at liberty to draft any exception to the requirements of 20 U.S.C. § 2409a(f). **Mann v. United States,** 399 F. 2d 672 (9th Cir. 1968). The United States may be sued only when it consents to be sued. **Simons v. Vinson,** 394 F. 2d 732 (5th Cir. 1968). When the consent to sue does exist, the suit may continue only when the preconditions for the waiver of sovereign immunity are met. In light of this, the limitations period set forth in 28 U.S.C. § 2409a(f), established by Congress, must be strictly observed and exceptions thereto are not to be implied. **Mann v. United States, supra** at 673.

This case was filed on October 4, 1976. A careful reading of the affidavits, interrogatories, and exhibits contained in the Court record reveals that Park and Sweet Grass Counties knew or should have known, within the meaning of § 2409a(f), of the claim by the United States to the land in question on or before October 4, 1964, a period of twelve years before the case was commenced.

The Absaroka National Forest was established on September 4, 1902, and was later renamed the Gallatin National Forest. The road right-of-way which plaintiff counties claim they own is within the boundaries of the Gallatin National Forest. The major portion of the purported road right-of-way claimed by the counties travels a route following Forest Service trails 104 and 184. Unquestionably, the trails are United States Forest Service trails. The Forest Service has maintained the trails since the early part of the Twentieth Century. Neither of the counties has maintained the purported road or authorized expenditures of any county money to maintain the routes in the Absaroka National Forest.

When the Absaroka Primitive Area was established in

April of 1932, a portion of the claimed right-of-way made by the plaintiffs followed Forest Service trail 104 through the Absaroka Primitive Area. In 1962, the Forest Service placed a sign at the north end of the Absaroka Primitive Area at the intersection of Slough Creek and Forest Service trail 104. The sign stated: "Entering Absaroka Primitive Area - Motor Vehicles Prohibited - Gallatin National Forest" Notwithstanding any question as to whether the purported road actually traveled through the Absaroka Primitive Area, it is undisputed that in 1962 the Forest Service claimed ownership and jurisdiction of the land traversed by the purported right-of-way by posting notice of its interest. The counties should have known of the United States' claim to the lands in question on or before October 4, 1964. In this regard, the denomination of the claim of the United States as legal or equitable has no practical significance on the question of notice of the United States' interest in the property to which title is sought to be quieted. **Hatter v. United States,** 402 F. Supp. 1192, 1194-95 (E.D. Cal. 1975).

The plaintiff counties argue that, even if the Court were to find that sufficient facts exist to find that the counties, or their predecessors in interest, knew or should have known of the claims of the United States to the land in question, the twelve-year period of limitations does not run against the state. The proposition put forth by the counties is that because the county is an arm of the state and because time does not run against the Crown when public rights are involved, and because the road right-of-way claimed here is a public right, then the twelve-year period for the statutes of limitation does not apply to these plaintiffs. Whatever appeal the argument may have, this Court has no power to engraft exceptions, for whatever reason, to the language of 28 U.S.C. §2409a(f). The twelve-year limitation was established by the Congress and must be strictly observed. **Mann v. United States, supra** at 673. In an action brought against the United States to quiet title to property claimed by the United States, the action must be brought within twelve years of the time the plaintiffs knew or should have known of the claim of the United States, regardless of whether the plaintiff is an arm of the state or an individual.

Therefore,

IT IS ORDERED that the motion to dismiss of the defendant United States be, and the same hereby is, granted.

IT IS FURTHER ORDERED that the motion for summary judgment of defendant intervenor, Cross Creek Protective Association, be, and the same hereby is, granted.

IT IS FURTHER ORDERED that judgment be entered by separate document in favor of the defendants and denying the plaintiffs all relief.

The Clerk is directed to notify the parties of the entry of this order.

Done and dated this 17th day of March 1978.

James F. Battin
United States District Judge

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MONTANA - BILLINGS DIVISION

PARK COUNTY, MONTANA and SWEET GRASS COUNTY, MONTANA, political subdivisions of the State of Montana,

Plaintiff,

vs.

UNITED STATES OF AMERICA, et al

Defendants

Civil Action File No. 76-125-BLG JUDGMENT

This action came on for hearing before the Court, Honorable James F. Battin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the motion to dismiss of defendant United States is granted. IT IS FURTHER ORDERED that the motion for summary judgment of defendant intervenor, Cross Creek Protective Association is granted. IT IS FURTHER ORDERED that judgment is entered in favor of the defendants and that plaintiff is denied all relief.

Dated at Billings, Montana, this 21st day of March, 1978.

JOHN E. PEDERSON
Clerk of Court
By/ Judy A. Lien
Deputy Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PARK COUNTY ASSOC., et al.,
Appellant,
vs.
USA, CROSS CREEK PROTECTIVE ASSOCIATION,
Appellee.

No. 78-1930
DC CV 76-125
JFB

APPEAL from the United States District Court for the District of MONTANA (BILLINGS).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of MONTANA (BILLINGS) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered August 29, 1980

A TRUE COPY ATTEST 22 Sept. 1980
Richard H. Deane
Clerk of Court
by: Oscar Tagle
Deputy Clerk

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, and counsel of record for Petitioners, does hereby certify, pursuant to Rule 28 of the Rules of the United States Supreme Court, that on the 10th day of Nov., 1980, three (3) copies of the foregoing Petition were served upon all parties required to be served, in the following manner:

(1) Upon the Respondent, UNITED STATES OF AMERICA, by depositing them in the United States Post Office at Big Timber, Montana, with air mail postage prepaid, addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

(2) Upon the Respondent, CROSS CREEK PROTECTIVE ASSOCIATION, by depositing them in the United States Post Office at Big Timber, Montana, with first class postage prepaid, addressed to counsel of record as follows:

James H. Goetz
Goetz and Madden
Attorneys at Law
P.O. Box 1322
Bozeman, Montana 59715

DATED this 10th day of Nov., 1980.

Conrad B. Fredricks

Conrad B. Fredricks